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PT CAKRA MANUNGGAL SEMESTA v. THE OWNERS AND/OR DEMISED CHARTERERS OF THE SHIP OR VESSEL RATU ENRA (IMO NO. 9274630) OF THE PORT OF PORT KLANG

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HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[ADMIRALTY IN REM NO: WA-27NCC-23-04-2021]
22 AUGUST 2022

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Abstract – *The court cannot and should not order the release of an arrested vessel on the security of a letter of undertaking issued by the ship owner's parent company despite the plaintiff insisting on the more common security in the form of a letter of undertaking from a P&I Club or bank guarantee from a first-class bank.*

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CIVIL PROCEDURE: *Admiralty – Action in rem – Arrest of vessel – Release – Plaintiff insisting on more common security in form of letter of undertaking from P&I Club or bank guarantee from first-class bank – Whether court can and should order release of arrested vessel on security of letter of undertaking issued by ship owner's parent company*

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The defendant was the registered owner of several vessels, including Ratu Enra and MT Bratasena. The plaintiff had filed the writ *in rem* against the defendant. Pursuant to a warrant of arrest, Ratu Enra was arrested. As Ratu Enra was an ongoing commercial asset, the defendant took immediate steps to seek its release, offering alternative security. The plaintiff informed the defendant that it was prepared to accept alternative security for the release of Ratu Enra in the sum of USD5,544,323.12 ('plaintiff's claim'). The defendant counter-proposed that the alternative security for the plaintiff's claim be in the form of an undertaking by the defendant's holding company, ENRA Group Berhad, as per the terms of the letter of undertaking attached to that letter ('ENRA Group LOU'). The plaintiff rejected the ENRA Group LOU, stating its genuine interest to continue negotiating with the defendant on alternative security and re-iterating its request for and willingness to accept either a first-class bank guarantee or a letter of undertaking from a P&I Club as security for Ratu Enra's release. The defendant then filed an application for an order, *inter alia*, that Ratu Enra be released from arrest on provision of the ENRA Group LOU. By the defendant's application, the defendant was essentially asking the court to order the plaintiff to accept the ENRA Group LOU over its preference for a bank guarantee from a first-class bank. The issue that arose was whether the court can and should order the

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release of an arrested vessel on the security of a letter of undertaking issued by the ship owner's parent company despite the plaintiff insisting on the more common security in the form of a letter of undertaking from a P&I Club or bank guarantee from a first-class bank.

Held (dismissing application):

(1) When a plaintiff has arrested a vessel, he has the vessel at his disposal and exercises a certain measure and control over the process of realising it to cover his reasonably best arguable case *ie* the amount of the claim, interest and costs. When he relinquishes that power and control for an alternative security like a bail bond or a bank guarantee or a P&I Club letter of undertaking, he is simply exchanging the vessel with a form of security that is more or less guaranteed. The bail bond could be executed without having to obtain judgment against the surety and reputable institutions issuing bank guarantee or letters of undertaking would unlikely want to risk their reputation by refusing to pay out on a valid demand made on them. However, a corporate letter of undertaking, like the ENRA Group LOU, offered in this case was another thing altogether. (paras 55, 56 & 58)

(2) If ENRA Group Bhd subsequently refused to pay out immediately on the plaintiff's demand on it, or decided that its own interests dictate that it should delay payment to the plaintiff for any reason whatsoever (including for reasons of inconvenience or because of its other pressing financial commitments at the time the demand was made), there was nothing to stop it from doing so. Moreover, ENRA Group LOU also intimated that its assets would have to be liquidated to settle the plaintiff's claim and there was no certainty of that. It was also uncertain whether their assets would still be available when that time comes. The plaintiff will then have no choice but to file an action based on the ENRA Group LOU and it's to get judgment first, before being in a position to execute against ENRA Group Bhd. (paras 58 & 59)

(3) From the point of view of enforceability and efficacy, the ENRA Group LOU was not on a similar footing to the common forms of security as payment need not necessarily be prompt or immediate. By ordering the plaintiff to accept the ENRA Group LOU over the bank guarantee it wanted, the plaintiff would, in effect, be relinquishing the power and control it would ordinarily have over the bank guarantee. In view of the possibility that ordering the plaintiff to accept the ENRA Group LOU over the bank guarantee it wanted may put the plaintiff to comparative risk and hardship, it was not an order the court can or should make. Furthermore, the reasonableness of the plaintiff's conduct was one of the matters to be considered. The plaintiff's insistence for a bank guarantee

over the ENRA Group LOU could hardly be called either unreasonable or oppressive. As for the alleged hardship, adversity or inconvenience that ENRA Group Berhad may have in procuring a bank guarantee, that was not a consideration. (paras 61-64)

Case(s) referred to:

'*Arcadia Spirit'; Esso Singapore Pte Ltd v. 'Arcadia Spirit' (Owners Of) [1988] 1 LNS 89* ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Concord Line Co Ltd v. The Owners Of The Ship "MOLLY" [1997] 4 CLJ Supp 285 HC ***(refd)***

Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Global Marine Drilling Co. v Triton Holdings Ltd [2001] 1 Lloyd's Law Reports 60 ***(refd)***

Kawasaki Kisen Kaisha, Ltd v. Owners Of The Ship Or Vessel "Able Lieutenant" [2002] 7 CLJ 478 HC ***(refd)***

Nature Everlasting Sdn Bhd v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "CSC Rui Hai" (IMO No: 9602851) Of The Port Hong Kong, China [2019] 1 LNS 232 HC ***(refd)***

Navios International Inc v. Ship 'Huang Shan Hai' [2011] FCA 895 ***(refd)***

Owners And/Or Other Interested Parties In The Indian Navy Ship Or Vessel Ins 'Jyoti' At Bombay's Port Harbour v. Owners And/Or Other Interested Parties In The Ship Or Vessel MV 'Yick Wing' Registered In The Port Of Panama [2001] 1 LNS 380 HC ***(refd)***

Sadit Timber Sdn Bhd & Anor v. The "Ling Yung" And "Thai Yung", Owners & Ors [1982] 1 LNS 116 HC ***(refd)***

Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

The "Arktis Fighter" [2001] 3 SLR 394 ***(refd)***

The "Benja Bhum" [1994] 1 SLR 88 ***(refd)***

The "H156" [1999] 3 SLR 756 ***(refd)***

The "Moschanthy" [1971] 1 Lloyd's Law Reports 37 ***(refd)***

The "Polo II" [1977] 2 Lloyd's Law Reports 115 ***(refd)***

The Bazias 3, The Bazias 4 [1993] 2 All ER 964 ***(refd)***

The Evmar [1989] 1 LNS 39 ***(refd)***

The MV Wick Ying, supra, and Nature Everlasting Sdn Bhd v. The Owners And/Or Demise Charterers of the Ship or Vessel "CSC Rui Hai" (IMO No: 9602851) Of The Port Hong Kong, China [2019] 1 LNS 232 HC ***(refd)***

The Piya Bhum [1994] 1 SLR 564 ***(refd)***

Legislation referred to:

Companies Act, 2016, s. 472(1)

Courts of Judicature Act 1964, s. 24(b)

Rules of Court, 2012, O. 70 rr. 1(1), 4, 9(9)

Rules of the High Court 1980, O. 22

Senior Courts Act 1981 [UK], ss. 2(2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), 20, 21, 22, 23, 24

For the plaintiff - Ch'ng Zhen Hon; M/s Chooi & Company + Cheang & Ariff

For the defendant - Aaron Siva; M/s Sathivale Mathew Arun

Reported by Najib Tamby

JUDGMENT

Azlan Sulaiman JC:

Overview

[1] The issue at hand is whether this court can and should order the release of an arrested vessel on the security of a letter of undertaking issued by the shipowner's parent company despite the plaintiff insisting on the more common security in the form of a letter of undertaking from a P&I Club or bank guarantee from a first-class bank.

Salient Background Facts

[2] ENRA SPM Labuan Limited ("the defendant") is the registered owner of several vessels, including Ratu Enra and MT Bratasena. A dispute between the plaintiff and the defendant involving the latter vessel is presently being arbitrated.

[3] On 30 April 2021, the plaintiff filed the writ *in rem* against the defendant. The endorsement to the writ states:

> The plaintiff claims damages from the defendants for breaches of contract, tortious breaches (including negligence and conversion) and/or breaches of duty and/or unjust enrichment arising out of or in relation to the charterparty dated 16 October 2017 between the plaintiffs (as owners) and the defendants (as charterers) for us of the MT 'BRATASENA' read with a Settlement Agreement dated 9 December 2019 entitled "Mutual Agreement on Exit Terms" together with interest and costs.

[4] The duration of the writ was extended twice, by orders of this court dated 28 October 2021 and 14 April 2022. By the latter, the duration was extended to 28 October 2022.

[5] On 27 May 2022, pursuant to a warrant of arrest also issued by this court, Ratu Enra was arrested.

[6] As Ratu Enra is an ongoing commercial asset, the defendant took immediate steps to seek its release, offering alternative security. In response, by a letter dated 31 May 2022, the plaintiff's solicitors informed the defendant's solicitors that the plaintiff was prepared to accept alternative security for the release of Ratu Enra in the sum of USD5,544,323.12 ("the plaintiff's claim") in the form of "either a first class bank guarantee or a letter of undertaking from a P&I Club, who is a member of the International Group of P&I Clubs, subject to terms to be agreed by our clients."

[7] Just two days later, on 2 June 2022, the defendant responded, counter-proposing that the alternative security for the plaintiff's claim be in the form of an undertaking by the defendant's holding company, ENRA Group

Berhad, as per the terms of the letter of undertaking attached to that letter ("ENRA Group LOU"). The ENRA Group LOU from ENRA Group Berhad to the plaintiff c/o the plaintiff's solicitors, reads:

> Dear Sirs,
>
> RE: ARREST OF THE VESSEL RATU ENRA (IMO No. 9274630) pursuant to a Warrant of Arrest issued by the Kuala Lumpur High Court under Adm. In Rem No: WA-27NCC-23-04/2021
>
> In consideration of your releasing from arrest and/or refraining from arresting or otherwise detaining or re-arresting at any time thereafter and/or interfering in any way with the use or trading of the above ship or any other ship or property or asset in the same or associated ownership, management, possession or control for the purpose of obtaining security respect of your claim which is presently being adjudicated in the AIAC Arbitration between yourselves and ENRA SPM Labuan Limited ("the said arbitration"),
>
> We, ENRA GROUP BERHAD, hereby undertake to pay you on demand such sum or sums as may be due to you from the said ENRA SPM Labuan Limited with our consent OR as finally adjudged in the said arbitration, provided always that our total liability hereunder shall not exceed the sum of United States Dollars Five Million Five Hundred Forty Four Thousand Three Hundred Twenty Three and cents Twelve Only (USD5,554,323.12), inclusive of interest and costs.
>
> This undertaking is given without prejudice to any rights and defences of ENRA SPM Labuan Limited to challenge the jurisdiction of the High Court in the abovementioned action or to set aside the Warrant of Arrest or to apply to Court top moderate security accordingly.
>
> This agreement shall be governed and construed in accordance with Malaysian law and any dispute arising hereunder shall be subject to the exclusive jurisdiction of the High Court of Malaya.
>
> Yours sincerely,
>
> for and on behalf of ENRA Group Berhad
> Kok Kong Chin
> Executive Director

[8] The very next day, the plaintiff responded by rejecting the ENRA Group LOU, stating its genuine interest to continue negotiating with the defendant on alternative security, and reiterating its request for and willingness to accept either a first-class bank guarantee or a letter of undertaking from a P&I Club as security for Ratu Enra's release.

[9] On 8 June 2022, the defendant filed an application for an order, *inter alia*, that Ratu Enra be released from arrest on provision of the ENRA Group LOU.

[10] I am given to understand that this may be the first case in Malaysia that a shipowner has sought the release of its arrested vessel on the provision of a corporate guarantee by its parent company. Indeed, the parties had adduced only one case authority involving that scenario, and that was a decision from the UK in January 2000. In these circumstances, it may be opportune to delve a little bit into the law regarding the giving of security for the release of vessels under arrest before dealing substantively with the defendant's application.

[11] At the outset, I should state that the cases I refer to are not the only case authorities on point, as they are a product of what the parties adduced as well as from some additional research I carried out. I should also mention that the cases I refer to are those which I believe assisted me and have a bearing on the decision I made on the defendant's application.

The Admiralty Jurisdiction Of The High Court

[12] The admiralty jurisdiction of the High Court is conferred by s. 24(b) of the Courts of Judicature Act 1964, which provides:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:
>
> > the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.

The United Kingdom Supreme Court Act 1981 is now known as the Senior Courts Act 1981.

[13] The admiralty jurisdiction and authority of the High Court of Justice in England is set out in ss. 20 to 24 of the Senior Courts Act 1981. Section 2(2)(a) to (r) of the Senior Courts Act 1981 sets out the subject matters on which the court's jurisdiction may be invoked. To invoke admiralty jurisdiction in an action *in rem* in Malaysia, a plaintiff must bring his action within one of these limbs.

[14] As the endorsement on the writ states that the plaintiff's claim arises out of a charter party, that would be limb (h), namely:

> any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

Order 70 Of The Rules Of Court 2012 And The Arrest Of Vessels

[15] Order 70 of the Rules of Court 2012, aptly entitled "Admiralty proceedings", governs the procedural law for admiralty proceedings in Malaysia. Rule 1(1) provides:

> This Order applies to Admiralty causes and matters, and the other provisions of these Rules apply to those causes and matters subject to the provisions of this Order.

[16] Rule 4 of O. 70 deals with the issuance of a warrant of arrest, and r. 9 provides for its execution. The overriding purpose of arresting a vessel is amply set out by Zulkefli J (later CJ (Malaya)) in *Kawasaki Kisen Kaisha, Ltd v. Owners Of The Ship Or Vessel "Able Lieutenant"* [2002] 7 CLJ 478; [2002] 6 MLJ 433. He said:

> At the outset, it is also important to note that the purpose of arresting a ship in an action *in rem* is to obtain security for the satisfaction of any judgment which the plaintiff may obtain in such an action, or of any sum which may become payable to him under a settlement of such an agreement. In practice, this threat of an arrest provokes the owners into providing voluntary security, for example by way of either a bank or insurance company guarantee, or letter of undertaking or filing a bail bond. The court does not have any jurisdiction to arrest or keep the ship under arrest for other purposes. Such security will ensure that the plaintiff's prospects of recovery are not hampered by any transfer of ownership in the ship or any financial impecuniosity of the shipowner. If security is not furnished by the shipowner, the arrest of the ship will be maintained until such step is taken by the plaintiff under the *in rem* process to seek from the court a judicial sale order of the ship.

Common Forms Of Security For The Release Of Arrested Vessels

[17] The bank or insurance company guarantee, letter of undertaking and the bail bond His Lordship mentioned in that case are the forms of security that vessel owners commonly offer to the arrestee for the release of their vessels. Though previously another form of security was payment into court under O. 22 of the Rules of the High Court 1980, that whole O. 22 was excluded when the present Rules of Court 2012 replaced the 1980 Rules.

[18] In *Concord Line Co Ltd v. The Owners Of The Ship "MOLLY"* [1997] 4 CLJ Supp 285, Abdul Malik Ishak J (as he then was) said of the bail bond:

> In admiralty proceedings, bail plays a prominent role. It is the substitution of personal for real security. It is usually given by a defendant who has acknowledged the issue or service of a writ *in rem*. The English law on bail is quite prolific. Bail, in English law, is normally given through a bail bond and as usual there would be sureties to the bond. A party has the right to insist on bail instead of a guarantee. It is said that bail takes the place of the ship and will be given initially to prevent the ship from being arrested or to obtain its release.

Bail in admiralty proceedings is always identified with the ship. The bail bond is limited to the amount of the ship if the ship is worth far less than the sum of the bond (*The Staffordshire* [1872] 1 Asp MLC 365; [1872] LR 4 PC 194).

[19] In *The Piya Bhum* [1994] 1 SLR 564, GP Selvam JC spoke of the advantages of a bail bond:

> The singular advantage of a bail bond over a letter of undertaking or guarantee is that the plaintiffs who have obtained a judgment or settlement which has been filed in court may proceed to levy execution

and need not bring a separate action against the sureties. This is made clear abundantly by the wording of the bail bond: 'Execution may issue against us'. Thus the judgment against the owners of the ship is also binding against the bailors even though they are not parties to the action. If this essential character is removed from the bail bond it utterly fails its purpose.

[20] Nevertheless, in the Australian Federal Court case of *Navios International Inc v. Ship 'Huang Shan Hai'* [2011] FCA 895, Rares J noted the preference of the bank/insurance company guarantee and the letter of undertaking over the bail bond:

The use of bail bonds appears to have become obsolete in recent years as was noted by the learned authors of *The Law and Practice of Admiralty Matters*, Sarah C Derrington and James M Turner (Oxford University Press, 2006) at [7.16]; see too the report of the *Australian Law Reform Commission, Civil Admiralty Jurisdiction*, (ALRC 33) at [300] and *MSC Samia* 78 FCR at 409E-G per Tamberlin J. They all noted that the modern widespread use of P&I Club letters of undertaking, bank guarantees or letters of undertaking, cash paid into court and other forms of private arrangements for the provision of security agreed between parties has, to a large extent, supplanted the practical utility of bail bonds. I am of opinion that in matters of international trade and commerce the Admiralty Courts can and should, so far as is practicable and appropriate, utilise their existing powers to accommodate the needs and usages of modern trade and commerce.

The Quantum Of Security

[21] The statements of Brandon J in *The "Moschanthy"* [1971] 1 Lloyd's Law Reports 37 have been accepted as setting out the appropriate perimeters and guidelines for determining the amount of security to be provided for the release of a vessel under arrest.

[22] In *The "Moschanthy"*, Brandon J said:

The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably argued best case.

[23] Abdul Malik J (as he then was) applied this principle in the *Concord Line Co Ltd* (*supra*) and added that the security provided cannot exceed the value of the vessel arrested.

[24] In *The "Moschanthy"* Brandon also touched on a plaintiff's conduct *vis-à-vis* a vessel owner in seeking security for release of the vessel:

It seems to me that the power to exact security in support of a claim *in rem* is a very strong power and it must not be used oppressively.

Where there is a genuine dispute or discussion about the appropriate amount of security in a case, the plaintiff ought to put his cards fairly on the table and explain to the defendant or his solicitors the grounds upon which he claims to exercise this strong power.

[25] Then, in *The "Polo II"* [1977] 2 Lloyd's Law Reports 115, Brandon J expanded on his earlier observations in *The "Moschanthy"*:

> I took the view in that case that the court had power to control the amount of security demanded by a plaintiff in an action *in rem* and that the control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover his reasonably best arguable case, that is to say cover the amount of the claim, the amount of any interest that might be recoverable and for the amount of any costs. And I took the view that the power of the court to control security in that way was derived from the inherent jurisdiction of the court to prevent any abuse of the process of the court, or the use of Court procedure in an oppressive way. As I pointed out in that case the power to arrest a ship is a very drastic power. And the power to insist that she remain under arrest unless security of a certain amount is given is equally a drastic power, and my view, which I expressed in *The Moschanthy* and which I repeat now, is that that power must not be exercised oppressively, and if it is exercised oppressively then the court can and should interfere to prevent conduct of that kind. At the same time the court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case.
>
> On that view of the law, when security demanded by plaintiffs in an action *in rem* is challenged by the defendants, the question for decision by the court is whether the demand is excessive, and therefore oppressive, or not. That is the issue which is raised before the court for its determination. It is for the plaintiffs to put a figure on the amount of security which they require. It is not for the defendants to do so. It is the plaintiffs who know what the details of their claim are, what facts the claim is based on and what the extent of the claim is on the best arguable case. It is impossible for the defendants at this stage of the proceedings to have anything like the knowledge about the plaintiffs' claim which the plaintiffs have.

(and then several passages later)

> The issue remains the same as it always was, namely whether the plaintiffs' demand was excessive and oppressive. The issue does not become is the plaintiffs' figure right or is the defendants' figure right. The question remains have these plaintiffs, in exercising the powers which a plaintiff *in rem* has acted oppressively by asking too much; and should they therefore be controlled by the court. That is the question which has to be decided, whether a counter-offer is made or not, and whatever its amount.

[26] In *The "H156"* [1999] 3 SLR 756, GP Selvam said that the arresting party must act with utmost expedition, must never abuse the power of arrest and act oppressively or unreasonably and must act in good faith and provide full and frank information in an organised form to enable the court to exercise its discretionary power on a legal and reasonable basis. Azhar J

(now CJ (Malaya)) referred to *The H156*, in *Owners And/Or Other Interested Parties In The Indian Navy Ship Or Vessel Ins 'Jyoti' At Bombay's Port Harbour v. Owners And/Or Other Interested Parties In The Ship Or Vessel MV 'Yick Wing' Registered In The Port Of Panam*a [2001] 1 LNS 380; [2001] 3 MLJ 549.

[27] The court also has the power to moderate and reduce the quantum of the security already provided. This is under O. 70 r. 9(9) of the Rules which provides:

> Where a writ in an action *in rem* has been issued and security sought, any person who has filed a memorandum of appearance may apply for an order specifying the amount and form of security to be provided.

[28] It is clear that O. 70 r. 9(9) does not only confer on the court the power to decide on the amount of the security but also its form. Interestingly, the Rules of the High Court 1980 (which the Rules of Court 2012 replaced with effect from 1 August 2012) did not have a similar provision to r. 9(9).

[29] In my view, it is only appropriate that the court has that power. Often enough the vessel's commercial use is ongoing and the shipowner is desperate for its expeditious release to continue and sustain the owner's business. Accordingly, the vessel owner may have agreed to the quantum of the security demanded by the plaintiff out of sheer desperation, with a caveat that it was open to the vessel owner to apply to court for the quantum to be reviewed and revised downward, if need be. Like here, where the ENRA Group LOU the defendant proposed clearly included that reservation. Nevertheless, even without that caveat or reservation, the court can still moderate and reduce the quantum of the security already provided if the circumstances so dictate, be it under O. 70 r. 9(9) or under its inherent jurisdiction.

[30] An illustration of the exercise of the Malaysian courts having exercised their powers to reduce the quantum of the security already provided are *The MV Wick Ying* (*supra*) and *Nature Everlasting Sdn Bhd v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "CSC Rui Hai" (IMO No: 9602851) Of The Port Hong Kong, China* [2019] 1 LNS 232.

[31] In the first, *The MV Wick Ying* had collided with a naval tanker in the Straits of Malacca, which the plaintiffs blamed on the defendant's vessel. The plaintiff then arrested the defendant's vessel as security for its pending claim for damages. After some communication between them, the defendant provided a letter of undertaking issued by the Britannia Steamship Insurance Assoc. Ltd in the sum of US$7,224,479.00. This sum was as per the plaintiff's breakdown of its loss/damage. After the vessel was released, the defendant applied to reduce the quantum of the undertaking. Azhar J (now CJ (Malaya)) said:

> A request for security that has to be made must be made reasonably, having regard to the circumstances of the incident and merits of the claim. The bottom line is still reasonableness.

A In this instant case, after some negotiations and in order to have a quick release of their vessel, the defendants acceded to the plaintiffs' demand for security.

They entered into a private agreement with the plaintiffs and provided security for the release of Yick Wing.

B (and later at the end of his judgment)

In the instant case however, the plaintiffs affected the arrest of the defendant's vessel and demanded payment for security for her release solely on the basis of their own belief and assumption that the defendants were the tortfeasors and were guilty in tort against them. In this regard,
C I must say that the plaintiffs were too presumptuous in their action. As the issue of 'who was right and who was wrong' is yet to be determined in a full trial, I do not think the plaintiffs have the right to cling on to the security furnished by the defendants.

This is more so as the defendants have already submitted to the
D jurisdiction of this court with regard to the plaintiffs' claim.

Coming back to the present case, notwithstanding what I have stated earlier, the decision of the defendants to accede to the plaintiffs' demand is purely a private matter and has nothing to do with the court. This court has been asked to interfere only in respect of the quantum.

E In this regard, and in the light of the views that I have expressed earlier on examination of the items, the head of the security has become irrelevant. It would be more appropriate in the circumstances for this court to order that the quantum of the security be reduced to an amount that has been conceded by the defendants in their submission, i.e. in the lump sum of US$3,802,497.09 which I now do.

F **[32]** In the *Nature Everlasting* case, the plaintiff claimed damages for the defendant's breach or contract and/or tort in relation to carriage of the plaintiff's iron ore on the defendant's vessel, and arrested it. It was subsequently released on the provision of a bank guarantee in the sum of US$4,000,000. On the defendant's application, Khadijah Idris J reduced the
G quantum of the security to just US$675,000 because that sum "in the opinion of this court, is sufficient to meet the plaintiff's claim." Notably, Nature Everlasting did not appeal against that aspect of Her Ladyship's decision.

The Form Of Security

H **[33]** As I had mentioned earlier, bank or insurance company guarantees, letters of undertaking and bail bonds are the common forms of security that vessel owners offer the arrestee for the release of their vessels, with the latter two often being preferred.

I **[34]** Where the parties have already agreed on the type of security, then that would constitute a private agreement between the parties, and the court would be hesitant to order a different or alternative security in its place.

[35] In *Sadit Timber Sdn Bhd & Anor v. The "Ling Yung" And "Thai Yung", Owners & Ors* [1982] 1 LNS 116; [1984] 2 MLJ 217, the defendant shipowner provided the plaintiff with a letter of undertaking *in lieu* of bail issued by HSBC to deposit RM1.7 million in court to secure the release of its vessel from the plaintiff's arrest. The defendant later applied to substitute that letter of undertaking with another, which the plaintiff refused and objected to. Chong Yik Liong J dismissed the application and said:

> I am of the view that where security in an action *in rem* is furnished by private agreement, such security can only be varied or substituted by mutual agreement of the parties or with the consent of the party affected by such variation or substitution. In the present case, the security by way of the Original Undertaking was given to the plaintiffs, and not to the Court in the form of a bail bond as provided under our Rules of the High Court Order 70, rule 15 (which is in *pari materia* with the English R.S.C. Order 75, rule 16) and I fail to see how I have any jurisdiction to make the Order sought in this application.

[36] It will also appear that, where a defendant is prepared to offer one of these common forms of security for the release of its vessel, then the courts would frown on the plaintiff rejecting that offer and insisting on one of the other common forms of security. Such was the case in *The Evmar* [1989] 1 LNS 39; [1989] 2 MLJ 460.

[37] In *The Evmar*, the plaintiff's cargo was damaged while on carriage on the defendant's vessel. Prior to arresting the vessel, the plaintiff asked the defendant to furnish a guarantee from a P&I Club, which the defendant agreed to subject to certain terms. When the plaintiff could not agree to those terms, the plaintiff arrested the vessel. Despite the defendant then providing the guarantee from a P&I Club that the plaintiff had earlier requested for, the plaintiff rejected it and insisted instead on a bail bond. The defendant then applied to set aside the warrant of arrest and also claimed for damages for wrongful arrest and detention of the vessel. Chao Hick Tin JC (as he then was) said:

> In my opinion since alternative security had been furnished to the plaintiffs in terms which the plaintiffs had asked for, the plaintiffs had no further reasons not to release the vessel.
>
> The test to be applied to determine whether there was wrongful continuance of an arrest is the same as that applicable to wrongful arrest, *ie*, *mala fides* or *crassa negligentia* implying malice: see *The Margaret Jane* (1869) 2 Adm & ECC 345. In my judgment, the plaintiffs' refusal on 14 March 1988 to accept the letter of undertaking amounted to at least malicious negligence. The arrest was clearly continued unnecessarily. The plaintiffs are therefore liable for damages for the continued detention of the vessel from 14 to 15 March 1988.

[38] *The Evmar* further indicates that the plaintiff must be reasonable in its choice of the form of security. I would agree, as that would provide uniformity and consistency in the application of O. 70 r. 9(9) to both the amount and the form of the security.

[39] Reasonableness was one of the bases of the decision of the Singapore High Court in *The "Benja Bhum"* [1994] 1 SLR 88. There, the plaintiff arrested that vessel and was prepared to release it upon the defendant furnishing it with a banker's guarantee on terms acceptable to the plaintiff. The terms included that it would cover "any final award or arbitration or any appeal therefrom or a final judgment of a court or tribunal of competent jurisdiction." The defendant would not agree to the words "or a final judgment of a court or tribunal of competent jurisdiction" because they were still negotiating for the plaintiff's claim to be resolved by arbitration, and proposed its own draft. When the plaintiff insisted on its draft and rejected the defendant's, the defendant applied to the court for the vessel's release. LP Thean JA said:

> I agree with the arguments made on behalf of the plaintiffs. Though the parties had agreed in principle to refer the plaintiffs' claim to arbitration, the terms of the agreement had yet to be agreed at that time. In effect, there was really no binding agreement.
>
> Even if I was wrong on this point, there was at least a doubt as to whether there was, at the time, a concluded valid and binding agreement between the parties to refer the plaintiffs' claim to arbitration. Clearly, a cogent argument could be mounted that no such agreement had been made. The plaintiffs had already arrested the vessel and had a security for their claim. They were therefore entitled in the circumstances to insist that the letter of undertaking should contain terms which would give them adequate protection or security in replacement of the res they had arrested. The terms required by them were wholly reasonable in the circumstances and I could not see any ground on which the defendants could justifiably refuse to accede to those terms.

The Credibility Of The Guarantor And The Efficacy Of The Security

[40] The credibility of the guarantor and the efficacy of the security to be provided is also a relevant consideration. In *The 'Arcadia Spirit'; Esso Singapore Pte Ltd v. 'Arcadia Spirit' (Owners Of)* [1988] 1 LNS 89; [1988] 3 MLJ 262, the plaintiff (Esso) arrested the defendant's vessel to enforce its claim for damage/loss to its oil loading berth and wharf facilities, requesting for security of US$50m in the form of a letter/bank guarantee. The defendant offered security in the form of a letter of undertaking to be issued by the Japan P&I Club, which the plaintiff rejected. The defendant then applied to the court for release of the vessel on provision of that letter of undertaking. Grimsberg JC said:

> I take the view that O. 70 r. 12(4) gives me the discretion to order the release of this vessel against the provision of a P & I Club letter of guarantee. P & I Clubs are now acknowledged as being part and parcel of the maritime industry. The unreported New Zealand case, *The Pacific Charge*r (CA, NZ, unreported) [a report of this judgment appears at [1988] 3 MLJ 263], to which Mr Selvam referred, establishes that a Club guarantee has been considered acceptable security by the court in New Zealand. In that case the scope of the New Zealand equivalent of our O. 70 r. 12(4) was considered. It is obvious, too, from the textbooks, that Club security has become acceptable as a matter of course, when negotiations for security take place outside the rules of court.
>
> There is admittedly a wrinkle, a very important wrinkle, in this case in that here we are dealing with a proposed letter of guarantee to be furnished by a Club which has no presence or assets here, and which resides in a non-Commonwealth and non-common law jurisdiction. Therefore, theoretically, there could be an enforcement problem. However, it seems to me that to allow that possibility to affect my mind would be to adopt a wholly negative approach. I prefer to proceed upon the assumption that the Japan Club - whose guarantees (as the evidence shows) are acceptable to a number of governments, including our own – that such a club which would stand to lose its international reputation were it to default on a guarantee – would fulfil its obligations with honour. Accordingly, I am inclined to order the release of the vessel in consideration of the provision of a letter of guarantee of the Japan Club in terms to be agreed.

[41] In *The "Arktis Fighter"* [2001] 3 SLR 394, the plaintiff questioned the financial standing of the P&I Club whom the defendant had proposed would provide the letter of undertaking for the release of its vessel. Choo Han Teck JC (as he then was) said:

> But, nonetheless, if there is sufficient evidence to warrant caution as there is in this case, there should be no order that security be furnished by the suspect insurer. In assessing commercial ratings of such nature the court should satisfy itself that data used by the analyst is not made up entirely of bruit. That the ratings were made by a renowned institution is also a factor to be taken into account. Once the court is satisfied that a vessel has been lawfully arrested, it will order its release only upon adequate security being furnished; otherwise the plaintiff will be relinquishing a substantial security in exchange for a vulnerable one.

[42] From these cases, it would appear that the courts apply the following principles and considerations in regard to resolving disputes on the amount of the security to release an arrested vessel:

(i) the plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably argued best case.

(ii) the amount of security cannot exceed the value of the arrested vessel.

(iii) the plaintiff must act expeditiously and should adduce cogent evidence to substantiate the amount of the security it is seeking.

(iv) the court will only intervene where the plaintiff has acted in bad faith or oppressively or where the amount demanded is excessive

[43] As for the form of security, the following principles and considerations would apply:

(i) where the parties have already agreed on the type of security, the court would be hesitant to order a different or alternative security in its place.

(ii) where a shipowner is already prepared to offer one of these common forms of security for the release of its vessel, then the courts would frown on the plaintiff rejecting that offer and insisting on another.

(iii) the plaintiff must be reasonable in its choice of the form of security.

(iv) the credibility of the surety and efficacy and enforceability of the guarantee or letter of undertaking is also important.

The Defendant's Application

The Defendant's Case

[44] The defendant put forth several grounds for urging this court to order the release of Ratu Enra on the security of the ENRA Group LOU.

[45] Firstly, the defendant contended that the ENRA Group LOU was superior to a P&I Club LOU because ENRA Group Berhad was a public listed company with assets in Malaysia to satisfy the plaintiff's claim. Thus, the plaintiff could readily sue ENRA Group Berhad.

[46] Secondly, the ENRA Group Berhad's director's report and audited financial statements dated 31 March 2022 ("the March 2022 report") showed that it was commercially solvent and could make good on the plaintiff's claim.

[47] Thirdly, ENRA Group Berhad had assets which it could liquidate, if need be, to settle the plaintiff's claim. These included:

(i) Ratu Enra, which had a current value of US$8.4m;

(ii) a single point mooring-system in Yetagun, Myanmar, with value of US$3.5m;

(iii) 1.8 acres of land in Rugby, England earmarked for development, over which ENRA Group Berhad had an interest valued at BP4.5m; and

(iv) unutilised banking lines of RM8m as at 31 May 2022.

[48] Fourthly, ENRA Group Berhad had its shareholders' mandate to do up to 20% of placement of new ordinary shares, which meant that it could potentially raise up to RM23m within a short period.

[49] Because of these factors, ENRA Group Berhad contended that it could easily meet the plaintiff's claim from its own assets, and therefore there was no reasonable basis for the plaintiff to reject the ENRA Group LOU.

[50] In regard to the plaintiff's request for a P&I Club LOU, the defendant contended that that request was unreasonable given that the liability under the charterparty dispute would not fall within the protection and indemnity risk that its P&I Club would be obliged to issue an undertaking for.

[51] As for providing a bank guarantee, the defendant contended that doing so would cause hardship and adversity to the plaintiff. ENRA Group Berhad's chief financial officer said the following in para. 19 of its affidavit in support of the defendant's application and in para. 13 of its affidavit in reply to the plaintiff's affidavit opposing to the defendant's application:

> If Enra Group Berhad is made to obtain a bank guarantee this would effectively lock up USD5,544,323.12 of Enra Group Bhd's funds as a bank guarantee it usually secured against a matching amount of cash deposit. This would materially and adversely affect the operations of Enra Group Berhad as a whole which in turn would be detrimental to the interest of the public shareholders of Enra Group Bhd.
>
> And
>
> In response to Paragraphs 18-19 of Ivan's Affidavit, I state as follows:
>
> (i) Obtaining a bank guarantee for this purpose will involve direct deposit of an equivalent amount of monies into the bank
>
> (ii) This will tie up capital that can best be utilised elsewhere
>
> (iii) There is no need to tie up working capital for the purposes of securing the release of the Vessel when a LOU from Enra Group Berhad will suffice
>
> (iv) CIMB Bank Bhd being one of our main bankers has confirmed that the issuance of an urgent Bank Guarantee for this purpose will require a matching cash deposit as collateral [112-113]. This supports our arguments above. It is also noteworthy that the bank has given a current confirmation to my paragraph 9 above.

The Plaintiff's Rejection Of The ENRA Group LOU

[52] The plaintiff's grounds for rejecting the ENRA Group LOU were simply that the ENRA Group LOU is not as reliable or as secure as a P&I Club LOU or a bank guarantee, and that the March 2022 report did not establish that the ENRA Group LOU was an adequate substitute. For the latter ground, this included the concern that, while the March 2022 report may indicate ENRA Group Berhad's financial position as at 31 March 2022,

A that may not necessarily be the case when the plaintiff wanted to cash-in on its claim upon a successful conclusion of its arbitration with the defendant, anticipated in 2023.

Analysis And Decision

B **[53]** By the defendant's application, the defendant is essentially asking the court to order the plaintiff to accept the ENRA Group LOU over its preference for a bank guarantee from a first-class bank.

[54] Even though *The "Moschanthy"* and *The "Polo II"* and the cases that followed them spoke of "sufficient security" in the context of the amount of C security to be provided for the release of a vessel under arrest, in my view those words should also be applied to the adequacy of the security. In other words, the security the plaintiff gives the vessel up for must be adequate and enforceable.

D **[55]** When a plaintiff has arrested a vessel, he has the vessel at his disposal, and exercises a certain measure and control over the process of realising it to cover his reasonably best arguable case, *ie*, the amount of the claim, interest and costs.

[56] When he relinquishes that power and control for an alternative E security like a bail bond, or a bank guarantee or a P&I Club letter of undertaking, he is simply exchanging the vessel with a form of security that is more or less guaranteed. The bail bond can be executed without having to obtain judgment against the surety and reputable institutions issuing bank guarantees or letters of undertaking would unlikely want to risk their reputation by refusing to pay out on a valid demand made on them.

F **[57]** Furthermore, by law, banks and financial institutions can only resist such a demand on fraud or unconscionability being shown. (See *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149; *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517; and *Sumatec Engineering And* G *Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1). Neither fraud nor unconscionability would likely exist in a situation where the beneficiary bases the demand on a judgment or arbitration award.

H **[58]** But a corporate letter of undertaking like the ENRA Group LOU offered in this case is another thing altogether. If ENRA Group Berhad subsequently refuses to pay out immediately on the plaintiff's demand on it, or decides that its own interests dictate that it should delay payment to the plaintiff for any reason whatsoever (including for reasons of inconvenience I or because of its other pressing financial commitments at the time the demand is made), there is nothing to stop it from doing so. Moreover, ENRA

Group LOU also intimated that its assets would have to be liquidated to settle the plaintiff's claim, and there is no certainty of that. It is also uncertain whether these assets will still be available when that time comes.

[59] The plaintiff will then have no choice but to file an action based on the ENRA Group LOU and its to get judgment first, before being in a position to execute against ENRA Group Berhad.

[60] Even if the plaintiff alternatively decides to file winding-up proceedings against ENRA Group Berhad or the defendant, it may ultimately find itself standing in line with other creditors. Or worse, if there are already winding-up proceedings against them, which may render any payment by them a void disposition of its property under s. 472(1) of the Companies Act 2016.

[61] Thus, from the point of view of enforceability and efficacy, the ENRA Group LOU is not on a similar footing to the common forms of security as payment need not necessarily be prompt or immediate. By ordering the plaintiff to accept the ENRA Group LOU over the bank guarantee it wants, the plaintiff would in effect be relinquishing the power and control it would ordinarily have over the bank guarantee.

[62] In view of the possibility that ordering the plaintiff to accept the ENRA Group LOU over the bank guarantee it wants may put the plaintiff to comparative risk and hardship, I do not think it is an order the court can or should make.

[63] Furthermore, as I mentioned earlier in this judgment, the reasonableness of the plaintiff's conduct is one of the matters to be considered. The plaintiff's insistence for a bank guarantee over the ENRA Group LOU can hardly be called either unreasonable or oppressive.

[64] As for the alleged hardship, adversity or inconvenience that ENRA Group Berhad may have in procuring a bank guarantee, that is not a consideration.

[65] In *Sadit Timber* (*supra)*, the defendant shipowner contended that procuring the letter of undertaking from HSBC to the plaintiff to release its vessel from the plaintiff's arrest would mean having RM1.7m tied up in court, which would work immeasurable hardship to the defendant, more so when its liability to the plaintiff had not yet been established. Chong Yik Liong J said:

> As regards the second ground, I do not think that there is any merit in it. Suffice it to say that the question of hardship is wholly irrelevant, since the plaintiffs are entitled to the security to be given as provided in the Original Undertaking, and it is not necessary for the plaintiffs to establish liability against the defendants so as to entitle them to such security; it is enough if the plaintiffs merely show that they have a reasonably arguable case against the defendants.

[66] In *The Bazias 3, The Bazias 4* [1993] 2 All ER 964, the defendants contended that, given their financial position, it would be quite impossible for them to find liquid resources in time to enable them to put up security for the release of their vessels. Lloyd LJ said:

> I regret that the difficulties which the defendants say they have in finding the necessary liquid resources and the inconvenience to the Sally Line and its passengers are not grounds to persuade me to depart from making the usual order.

"Sovereign Explorer"

[67] The decision from the UK in January 2000 that I mentioned early on in this judgment where a corporate guarantee was ordered as security for the release of a vessel is *Global Marine Drilling Co. v Triton Holdings Ltd* [2001] 1 Lloyd's Law Reports 60.

[68] In that case, the plaintiff and the defendant were engaged in a substantial monetary dispute (US$140m) arising from the sub-charter of a semi-submersible, self-propelled drilling rig. The plaintiff arrested the defendant's mobile offshore drilling rig called "sovereign explorer". Two earlier applications by the defendant for its release, the first on the allegation that the arrest was numinous and oppressive, and the second on the production of a guarantee from its parent company, were dismissed.

[69] In its third application, the defendant applied for the release on the strength of a guarantee from Schlumberger Ltd, of which the defendant and its parent company were members of its offshore drilling division. The defendant proposed the guarantee because the bank guarantee the plaintiff wanted would cost it US$1m per year. The defendant also adduced a report that Schlumberger Ltd's operating revenue was just under US$12b, its net assets over US$8b and its market capitalisation was US$32b. The defendant also adduced a second report made by an experienced international banker who opined that a guarantee by Schlumberger Ltd in the sum of US$152m for a period of up to four years would be a security equivalent to a bank guarantee.

[70] The defendant further submitted that Schlumberger Ltd had no history of failing to honour its liabilities, any failure now would have a grave impact on its reputation, and it was therefore inconceivable that it would seek to evade its liability if its guarantee were called upon.

[71] Lord Macfadyen allowed the defendant's application on the basis that, on that evidence, Schlumberger Ltd was of reliable financial standing, and a guarantee by Schlumberger Ltd would be adequate security.

[72] I would respectfully not follow that decision. It was made on its facts, and not all of the factors to be considered which I mentioned earlier, particularly the reasonableness or otherwise of the plaintiff's conduct and the irrelevance of the difficulties the defendant would face in procuring the bank guarantee the plaintiff sought, do not appear to have been considered there.

[73] In simple terms too, ENRA Group Berhad is no Schlumberger Ltd. In my opinion, the ENRA Group LOU is not adequate security, or even on par with the bank guarantee the plaintiff seeks.

Conclusion

[74] On the basis that the plaintiff is entitled to adequate protection or security in replacement of Ratu Enra which it arrested, that the plaintiff's rejection of the ENRA Group LOU and its insistence on a bank guarantee from a first-class bank as security for the release of Ratu Enra was neither unreasonable and oppressive, and that there were no justifiable reasons for the defendant to refuse to provide the bank guarantee, I therefore dismissed the defendant's application, with costs of RM5,000 subject to allocator.